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United States Department of the Interior
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
SUITE 310
625 SILVER AVENUE, S.W.
ALBUQUERQUE, NEW MEXICO 87102

TAKE PRIDE IN AMERICA

In Reply Refer To:

December 17, 1991

RECEIVED
DEC 23 1991
DIVISION OF
OIL GAS & MINING

Dr. Dianne R. Nielson, Director
Division of Oil, Gas and Mining
Department of Natural Resources
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, UT 84180-1203

Re: Ten-Day Letter (TDL) 91-02-370-001 and Ten-Day Notice (TDN) 89-02-370-003, Trail Canyon

Dear Dr. Nielson:

The TDL was issued on February 20, 1991, for failure to make a written demonstration showing that highwalls were eliminated to the extent technically practical in accordance with Utah Rule 614-301-553-500.

On March 12, 1991, the Albuquerque Field Office (AFO) found the Division of Oil, Gas and Mining's (DOGM) response to the above-noted TDL to constitute appropriate action at that time. The written finding was based on DOGM's issuance of a "Division Order" requiring Co-Op Mining Company to make a permit change relating to the requirements of R614-301-553.500. AFO's letter of March 12, 1991, also indicated an on-going review of the "Division Order" in relation to a final decision on the TDL and the above-noted TDN that involved the retention of a concrete chute foundation.

The Office of Surface Mining Reclamation and Enforcement (OSM) reviewed the documentation developed to support the revision that was submitted to this office on May 30, 1991. A site visit involving the Western Support Center (WSC) was conducted on September 6, 1991. The WSC report is forwarded for your information.

The WSC report identifies reclamation issues that should be addressed by DOGM prior to final reclamation of the site. However, consistent with the agreements reached at the November 7, 1991, meeting between OSM and DOGM regarding acceptance of highwalls where Phase I release has occurred and the discussion relative to applicability of Rule 614-553-500, AFO is finalizing the March 12, 1991, appropriate response to the TDL and finds the State response to Part 2 of the TDN to be appropriate.

If you have any questions regarding these matters, please contact Stephen Rathbun at (505) 766-1486.

Sincerely,

Robert H. Hagen, Director
Albuquerque Field Office

Enclosure

centrating, preparing, or loading of coal at a place other than the mine site; Adoption of SMC 843.20.

(j) The following amendments as submitted to OSMRE on March 3, 1986, are approved effective July 28, 1986.

(1) Modifications to Utah regulations, sections SMC 816.61 and UMC 817.61, revised February 5, 1986.

(2) Modifications to Utah regulations, sections SMC/UMC 850.5 et seq., revised February 5, 1986.

(3) Memorandum of Agreement between the Board and Division of Oil, Gas, and Mining and the Utah Industrial Commission.

(4) Utah Code Annotated Title 40. Chapter 2. Coal Mines, Utah Industrial Commission, sections 40-2-14 through 40-2-16.

(5) General Safety Orders, Utah Industrial Commission, Coal Mines, sections 51 through 53.

(k) The following amendment to the Utah State program which was submitted to OSMRE by Utah on September 3, 1986, is approved effective January 28, 1987.

Revision of the definition for "coal processing plant" and adoption of a definition for "coal processing" under SMC/UMC 700.5.

(l) The following amendment is approved effective March 28, 1988: Modification to the Utah State Program regulations submitted to OSMRE by Utah on January 8, 1988. The modification was as follows: redesignation of the existing SMC/UMC 845.15 (b)(2) as (b)(1)(ii) and adding a new paragraph (b)(2) to provide for a 30-day cap on civil penalty assessments.

(m) The following amendment is approved effective August 18, 1988: Revision of SMC/UMC 785.19(e)(2) regarding alluvial valley floors as submitted by Utah to OSMRE on September 24, 1987, and revised by Utah on April 6, 1988.

(n) With the exceptions of R614-100-200, the first definition of "fragile lands"; R614-100-200, the definition of "previously mined area" to the extent that the definition interprets or contemplates the temporal concept of "previously" as being any other date than August 3, 1977, or allows lands which have once been fully and satisfactorily reclaimed to be remined, and then only partially reclaimed; R614-100-200, the definition of "road" to the extent that it includes the phrase "public roads when an evaluation of the extent of the mining-related use of the road to the public uses of the road has been made by the Division;" R614-100-200, the "takings" test as it applies to the definition of "valid existing rights;" R614-100-415, Federal lands coal exploration operations requirements to the extent the rule includes the phrase "which removes less than 250 tons;" R614-301-731.212, R614-301-731.223, ground and surface water monitoring requirements to the extent the rule includes the word "accessible;" R614-103-221 and R614-103-222, areas unsuitable for coal mining and reclamation operations; R614-301-352, contemporaneous reclamation; R614-301-411.145, land use; R614-301-525.160 and R614-301-525.232, subsidence control requirements to the extent the rules include the phrase "to the extent required by Utah law;" R614-301-528.320, coal waste disposal requirements to the extent that the rule would allow end dumping or side dumping of coal mine waste in coal mine waste disposal areas; R614-301-553.700 and R614-301-553.800, backfilling and grading of thin and thick overburden surface mines; and R614-302-271, variances from approximate original contour (AOC) requirements to the extent that the rule does not limit the allowance of variance from AOC to steep-slope mining operations, the following revisions to the Utah permanent regulatory program rules submitted to OSM on August 11, 1989, are approved effective April 12, 1990:

R614-100	Administrative: Introduction.
R614-101	Administrative: Restrictions on State Employees.
R614-102	Administrative: Exemption for Coal Extraction Incident to Government-Financed Highway or other Construction.
R614-103	Administrative: Areas Unsuitable for Coal Mining and Reclamation Operations.
R614-104	Administrative: Protection of Employees.
R614-105	Administrative: Blaster Training, Examination and Certification.
R614-200	Coal Exploration: Introduction.
R614-201	Coal Exploration: Requirements for Exploration Approval.
R614-202	Coal Exploration: Compliance Duties.
R614-203	Coal Exploration: Public Availability of Information.
R614-300	Coal Mine Permitting: Administrative Procedures.
R614-301	Coal Mine Permitting: Permit Application Requirements.
R614-301-100	General Contents.
R614-301-200	Soils.
R614-301-300	Biology.
R614-301-400	Land use and Air Quality.
R614-301-500	Engineering.
R614-301-600	Geology.
R614-301-700	Hydrology.
R614-301-800	Bonding and Insurance.
R614-302	Coal Mine Permitting: Special Categories and Areas of Mining.
R614-302-100	General.
R614-302-200	Special Categories of Mining.
R614-302-300	Special Areas of Mining.
R614-303	Coal Mine Permitting: Change; Renewal; and Transfer, Assignment, or Sale of Permit Rights.
R614-303-100	General Information on the Change, Renewal Assignment of Sale of Permit Rights.
R614-303-200	Permit Review, Change and Renewal.
R614-303-300	Transfer, assignment, or Sale of Permit Rights.
R614-400	Inspection and Enforcement: Division Authority and Procedures.
R614-400-100	General Information on Authority and Procedures.
R614-400-200	Information Related to Inspections.
R614-400-300	Provisions of State Enforcement.
R614-401	Inspection and Enforcement: Civil Penalties.
R614-401-100	Information on Civil Penalties.
R614-401-200	When Penalty will Be Assessed.
R614-401-300	Point System for Penalties.
R614-401-400	Assessment of Separate Violations for Each Day.
R614-401-500	Waiver of Use of Formula to Determine Civil Penalty.
R614-401-600	Procedures for Assessment of Civil Penalties—Proposed Assessment.
R614-401-700	Procedures for Informal Assessment Conference.
R614-401-800	Request for Formal Hearing.
R614-401-900	Final Assessment and Payment of Penalty.
R614-402	Inspection and Enforcement: Individual Civil Penalties.
R614-402-100	Information on Individual Civil Penalties.
R614-402-200	When an Individual Civil Penalty May Be Assessed.
R614-402-300	Amount of the Individual Civil Penalty.
R614-402-400	Procedure for Assessment of Individual Civil Penalty.
R614-402-500	Payment of Penalty.

(o) Revisions to the following sections of the Utah Code Annotated 1953, title 40, as submitted to OSM on November 13, 1989, and revised on May 29, 1990, are approved effective August 13, 1990.

40-10-10 Permit Applications
40-10-14 Permit Findings Issued to the Applicant and Other Interested Parties
40-10-20 Civil Penalty for Violations
40-10-21 Civil Actions
40-10-25 Dedicated Credits, Transfer of Funds, and Investment By State Treasurer
40-10-30 Judicial Review of Rules and Orders
40-10-31 Adjudicative Procedures That Supersede Chapter 46b, Title 63

(p) Revisions to the following sections of the Utah Code Annotated 1953, title 40, as submitted to OSM on October 10, 1990, are approved effective January 29, 1991: U.C.A. 40-10-6.5 (1), (2), and (3), rulemaking authority and procedures, and U.C.A. 40-10-6.6 (1) and (2), deadline for review and proposal of revision of rules, and deadline for revision of rules.

(q) With the exceptions of (1) R614-100-200, the phrase "the prohibition caused by 40-10-24 of the Act" in subsection (c)(ii) of the definition of "valid existing rights;" (2) R614-100-200, the phrase "and may not include public roads as determined on a site-

sufficient time to consider and comment on them. FDA agrees in part with the request and is extending both comment periods for 30 days. Accordingly, the comment periods for these final rules are extended to October 15, 1993. However, the medical device tracking final rule became effective on August 29, 1993, and this extension of the comment period does not affect the obligation of manufacturers to have tracking systems in place.

Interested persons may on or before October 15, 1993, submit to the Dockets Management Branch (address above) written comments regarding these final rules. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: September 14, 1993.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 93-22819 Filed 9-14-93; 3:53 pm]

BILLING CODE 4160-01-F

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 2606 and 2617

Rules for Administrative Review of Agency Decisions; Standard Terminations of Single-Employer Plans; Correction

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Interim rule; correction.

SUMMARY: This document corrects the interim rule published Tuesday, August 24, 1993 (58 FR 44738), which amended the PBGC's regulations governing administrative review of agency decisions and standard terminations of single-employer plans to provide for modification of certain of the deadlines in those regulations in the event of a major disaster. This action is needed to correct certain errors.

EFFECTIVE DATE: August 24, 1993.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or Renae R. Hubbard, Special Counsel, Office of the General Counsel (Code 22000), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006, 202-778-8850 (202-778-1958 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The interim rule that is the subject of these corrections amended parts 2606 and 2617 of the PBGC's regulations, Rules for Administrative Review of Agency Decisions and Standard Terminations of Single-Employer Plans, to provide disaster victims with relief from certain deadlines imposed by these regulations.

As published, the proposed rule contains certain errors which are in need of correction. Accordingly, the publication on August 24, 1993 of the interim rule, which was the subject of FR Doc. 93-20600, is corrected as follows:

1. On page 44738, in the third column, in the nineteenth line of the second paragraph, after "notice" insert ", or with respect to whom the office of the service provider, bank, insurance company, or other person maintaining the information necessary to file the request for reconsideration or appeal is in such an area".

2. On page 44739, in the second column, in the first line, after "sponsor" insert ", or the office of the service provider, bank, insurance company, or other person maintaining the necessary records,".

3. On page 44739, in the second column, in the sixteenth line of the fourth full paragraph, after "relieving" insert "aggrieved persons of".

§ 2606.4 [Corrected]

4. On page 4470, in the first column, in § 2606.4(b)(1), in the fifth line, after "area" insert ", or with respect to whom the office of the service provider, bank, insurance company, or other person maintaining the information necessary to file the request for reconsideration or appeal is within a designated disaster area".

§ 2617.25 [Corrected]

5. On page 44470, in the second column, in § 2617.25(a) (2) (i), in the sixth line, after "administrator" insert ", or the office of the service provider, bank, insurance company, or other person maintaining the information necessary to issue the notices of plan benefits required by § 2617.23 or to file the standard termination notice required by this section,".

§ 2617.28 [Corrected]

6. On page 44740, in the third column, in § 2617.28(f)(4)(i), in the sixth line, after "administrator" insert ", or the office of the service provider, bank, insurance company, or other person maintaining the information necessary to complete the distribution of plan assets.".

Martin Slate,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 93-22806 Filed 9-16-93; 8:45 am]

BILLING CODE 7708-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 944

Utah Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of proposed amendment.

SUMMARY: OSM is announcing its decision to approve, with certain exceptions and additional requirements, a proposed amendment to the Utah permanent regulatory program (Utah program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists primarily of changes to provisions of the Utah program pertaining to backfilling and grading performance standards and the reclamation of highwalls. The amendment is primarily intended to clarify the Utah regulations regarding highwall retention under the Utah approximate original contour alternative, and add regulations regarding highwall retention at underground mines that have operated continuously from before the effective date of SMCRA to the present.

EFFECTIVE DATE: September 17, 1993.

FOR FURTHER INFORMATION CONTACT: Robert H. Hagen, Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, 505 Marquette NW., suite 1200, Albuquerque, NM 87102; Telephone (505) 766-1486.

SUPPLEMENTARY INFORMATION:

I. Background on the Utah Program

On January 21, 1981, the Secretary of the Interior conditionally approved the Utah program for the regulation of coal exploration and coal mining and reclamation operations on non-Federal

and non-Indian lands. General background information on the Utah program, including the Secretary's findings, the disposition of comments, and an explanation of the conditions of approval, is in the January 21, 1981, Federal Register (46 FR 5899). Actions taken subsequent to approval of the Utah program are codified at 30 CFR 944.15, 944.16, and 944.30.

II. Submission of Proposed Amendment

By letter dated April 30, 1992 (administrative record No. UT–758), Utah submitted to OSM a proposed amendment to the Utah program pursuant to SMCRA, 30 U.S.C. 1201–1328, and the Federal regulations at 30 CFR Chapter VII (the Federal regulations). Utah submitted the proposed amendment in response to a January 9, 1991, letter that OSM sent to Utah in accordance with 30 CFR 732.17(c) (administrative record No. UT–607). The provisions of the Utah Coal Mining Rules that Utah proposed to amend are: Utah Administrative Rule (Utah Admin. R.) 645–100–200, definition of "highwall;" Utah Admin. R. 645–301–553, 553.100 and 130, backfilling and grading; Utah Admin. R. 645–301–553.210 and 220, spoil and waste; Utah Admin. R. 645–301–553.260, refuse piles; Utah Admin. R. 645–301–553.510, 520, and 521, previously mined areas; and Utah Admin. R. 645–301–553.620 through 655, approximate original contour (AOC).

OSM published a notice in the June 2, 1992, Federal Register (57 FR 23181), announcing receipt of the amendment and inviting public comment on its adequacy (administrative record No. UT–767). The public comment period closed July 2, 1992.

During its review of the amendment, OSM identified concerns regarding Utah Admin. R. 645–301–553.130, regrading requirements and the static safety factor for retained highwalls; Utah Admin. R. 645–301–553.510, 520, and 521, backfilling and grading of previously mined areas; Utah Admin. R. 645–301–553.650, highwall retention criteria; and Utah Admin. R. 645–301–553.651, allowable height and length standards for retained highwalls. OSM notified Utah of the concerns by letter dated September 10, 1992 (administrative record No. UT–779).

By letter dated September 30, 1992, Utah responded by submitting additional explanatory information and a revised amendment (administrative record No. UT–788). Utah proposed to revise Utah Admin. R. 645–301–553.130 and 523, requirements for highwall and highwall remnant stability and demonstrations by the operator of stability and safety; Utah Admin. R. 645–301–553.510, 520, and 521, backfilling and grading of previously mined areas; and Utah Admin. R. 645–301–553.650 and 652, AOC highwall retention criteria.

OSM announced receipt of the revised amendment in the December 9, 1992, Federal Register (57 FR 58171), and, in the same notice, reopened and extended the public comment period and provided opportunity for a public hearing on the adequacy of the amendment considering the additional materials submitted (administrative record No. UT–807). The comment period closed December 24, 1992.

III. Director's Findings

After a thorough review, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, the Director finds, with certain exceptions and additional requirements, that the proposed amendment as submitted by Utah on April 30, 1992, and as revised by it on September 30, 1992, is not inconsistent with SMCRA and the Federal regulations.

1. Nonsubstantive Revisions to Utah's Regulations

Utah's proposed revisions to the following previously-approved regulations are nonsubstantive in nature and consist of minor editorial, punctuation, and codification changes. Corresponding Federal provisions, if any exist, are listed in parentheses:

Utah Admin. R. 645–100–200 (30 CFR 701.5), definition of "highwall;"
Utah Admin. R. 645–301–553.100 (30 CFR 816.102(a)), backfilling and grading of disturbed areas;
Utah Admin. R. 645–301–553.130 (30 CFR 816.102(a)(3)), 1.3 static safety factor;
Utah Admin. R. 645–301–553.620 (30 CFR 816.102(k)(3)(iii)), incomplete elimination of highwalls in previously mined areas;
Utah Admin. R. 645–301–553.630 and .631 (30 CFR 816.102(k)(3) and (k)(3)(i)), required regulatory authority approval for mountaintop removal operations;
Utah Admin. R. 645–301–553.632 and .633 (30 CFR 816.102(k)(1) and (2)), AOC variance criteria; and
Utah Admin. R. 645–301–553.655, exemption from obtaining a variance from AOC requirements.

The proposed revisions to these previously-approved Utah regulations are nonsubstantive in nature, and the Director finds that these proposed Utah regulations are not inconsistent with SMCRA and the Federal regulations. The Director approves these proposed rules.

2. Utah Admin. R. 645–301–553, Placement of Material in Road and Portal Pad Embankments Located on the Downslope

Utah proposes to delete the phrase "[f]or the purposes of underground coal mining and reclamation activities" from existing Utah Admin. R. 645–301–553, which allows the placement of material in road and portal pad embankments on the downslope as long as (1) the material used and the embankment design comply with Utah Admin. R. 645–301–500 through 700 (Utah's engineering, geology, and hydrology performance standards), and (2) and the material is moved and placed in a controlled manner. The effect of this proposed deletion is that this rule would now allow surface as well as underground mining operations to place material in road and portal pad embankments located on the downslope as long as the applicable Utah engineering, geology, and hydrology performance standards are met, and the material is moved and placed in a controlled manner.

There is no current Federal counterpart provision to this State provision. However, prior to a Federal rulemaking action on May 24, 1983 (48 FR 23356), that took effect on June 23, 1983, the Federal regulations did contain a provision at former 30 CFR 826.12(a)(2) pertaining to operations on steep slopes. Former 30 CFR 826.12(a)(2) was substantively similar to proposed Utah Admin. R. 645–301–553 to the extent that it also allowed the placement of material in road embankments located on the downslope, as long as the material used and embankment design complied with the requirements of 30 CFR 816.150 through 816.180 or 817.150 through 817.180, and the material was moved and placed in a controlled manner.

Former 30 CFR 826.12(a)(2) was promulgated as part of the permanent program regulations on March 13, 1979 (44 FR 14902, 15454) to respond to comments received by OSM on the proposed permanent program regulations, which were published on September 18, 1978 (43 FR 41662, 41925). Specifically, certain commenters were concerned the language originally proposed at 30 CFR 826.12(a), which prohibited the placement of spoil, waste materials, or debris on the downslope in steep-slope areas, would prohibit the construction of access and haul roads into permit areas because spoil could not be placed on the downslope, and road fills could not be constructed. Stating that it agreed that haul roads are essential for access

to the mine area. OSM added the language at former 30 CFR 826.12(a)(2) to clarify that 30 CFR 826.12(a)(1) (originally proposed as 30 CFR 826.12(a)) did not prohibit the construction of access and haul roads (44 FR 14902, 15290–15291, March 13, 1979).

On May 24, 1983 (48 FR 23356), OSM promulgated a final rule that, among other things, moved the prohibitions of former 30 CFR 826.12(a)(1) to 30 CFR 816.107(b) for surface mining activities and to 30 CFR 817.107(b) for underground mining activities. In the same rulemaking action, OSM deleted former 30 CFR 826.12(a)(2) from the regulations. OSM provided its rationale for deleting former 30 CFR 826.12(a)(2) in the proposed rule published on June 21, 1982 (47 FR 26754). OSM reasoned that the provision was not necessary and could be removed from the rules because roads are structures, and the prohibitions of former 30 CFR 826.12(a)(1) (current 30 CFR 816.107(b) and 817.107(b)) concern only such materials as spoil and debris (47 FR 26754, 26765, June 21, 1982). In other words, the former 30 CFR 826.12(a)(2) was not necessary because the prohibitions of former 30 CFR 826.12(a)(1) (current 30 CFR 816.107(b) and 817.107(b)) were never meant to prohibit the construction of access and haul roads.

The Director finds that Utah's proposed revision to Utah Admin. R. 645–301–553 is not inconsistent with the rationale OSM set forth in the above-cited rulemaking regarding the deletion of former 30 CFR 826.12(a)(2) (47 FR 26754, 26765, June 21, 1982). The Director interprets the State provision at proposed Utah Admin. R. 645–301–553 in a manner consistent with the rationale set forth in this former rulemaking. That is, the Director interprets the State provision as merely clarifying that nothing in the approved Utah State program, including Utah Admin. R. 645–302–234.200 (counterpart provision to former 30 CFR 826.12(a)(1), current 30 CFR 816.107(b) and 817.107(b)), prohibits the construction of access and haul roads.

The Director notes that the State provision at proposed Utah Admin. R. 645–301–553 differs from the former Federal regulation at 30 CFR 826.12(a)(2) in two respects. However, neither of these differences makes the proposed rule less stringent than SMCRA or less effective than the Federal regulations. The first difference is that the State provision, unlike the former Federal provision, applies to placement of material not only in road embankments, but also in portal pad embankments located on the downslope. In a final rule Federal Register notice dated December 13, 1982, the Secretary previously approved Utah's portal pad embankment provision included in the current proposed rule as being consistent with former 30 CFR 826.12(a) (47 FR 55672, 55674). The second difference is that the State provision, unlike the former Federal provision, is not limited to steep-slope mining areas. Utah's regulation of nonsteep-slope mining areas is not inconsistent with 30 CFR 816.107(b) and 817.107(b) or any other Federal regulations.

Based upon the interpretation and analysis above, the Director interprets the State provision to mean that nothing in the Utah regulations, either at Utah Admin. R. 645–302–234.200 or at Utah Admin. R. 645–301–553, is meant to prohibit the construction of access and haul roads or the construction of portal pads, either in steep-slope, or in nonsteep-slope areas, as long as the material is moved and placed in a controlled manner and applicable performance standards are met. On this basis, the Director (1) finds that proposed Utah Admin. R. 645–301–553 is not inconsistent with the Federal regulations and (2) approves the proposed rule.

3. Proposed Amendment Provisions Dealing With Exceptions to SMCRA's Requirement for the Elimination of all Highwalls

(A) Background Information

(1) *SMCRA's requirement to eliminate highwalls.* Section 515(b)(3) of SMCRA requires that all mined land be backfilled and graded and returned to AOC. Section 515(b)(3) also expressly requires that to achieve AOC, all highwalls must be eliminated. The statutory requirement to eliminate all highwalls is implemented in the Federal regulations at 30 CFR 816.102(a)(2) and 817.102(a)(2). The legislative history of SMCRA reveals that "the elimination of highwalls [and the] return of the land to [AOC] * * * are among the standards critical to the elimination of the worst effects of coal surface mining." *In re Permanent Surface Min. Regulation Litigation*, 620 F. Supp. 1519, 1573 (D.D.C. 1985) (*quoting* H.R. Rep. No. 218, 95th Cong., 1st Sess. 85 (1977), U.S. Code Cong. & Admin. News, 1977, 621).

The following excerpts from the legislative history are informative:

> The Senate amendment provided a variance to the [AOC] and backfilling highwalls completely for a wide range of post mining land uses. In addition, if "sound engineering technology" indicated that the highwall could not be completely backfilled, then the operator would have been required to reduce the highwall to the maximum extent consistent with "sound engineering technology" and develop a revegetation plan that is "reasonably calculated" to screen the remaining highwall within 5 years. H.R. 2 included no such provision.
>
> Conferees agreed on a modified variance to the [AOC] standard which requires that *all highwalls are to be completely backfilled in every instance.* * * * Conferees did not adopt the "sound engineering technology" provision of S. 7.
>
> H.R. Rep. No. 95–493, 95th Cong., 1st Sess. 108–109 (1977) (emphasis added).
>
> H.R. 25 required the elimination of "depressions" and this language, which was a holdover from a very early draft of the bill, causes some confusion. *What is crucial is the elimination of (1) highwalls, and (2) spoil piles in all cases, with no exceptions.*
>
> H.R. Rep. No. 94–1445, 94th Cong., 1st Sess. 8, n. 3 (1976) (emphasis added).

Numerous court decisions have also emphasized the importance of highwall elimination to SMCRA's regulatory scheme. *See e.g. National Wildlife Federation* v. *Lujan*, 733 F. Supp. 419 (D.D.C. 1990); *In re Permanent Surface Mining Litigation*, 620 F. Supp. 1519 (D.D.C. 1985); *In re Permanent Surface Mining Regulation Litigation*, 21 ERC 1193 (D.D.C. 1984). *See also River Processing, Inc.*, 76 IBLA 129 (1983), *aff'd. River Processing, Inc.* v. *Clark*, No. 83–316 (E.D. Ky. May 2, 1985); *Grafton Coal Co., Inc.*, 3 IBSMA 175, 88 I.D. 613 (1981); *Tollage Creek Elkhorn Mining Co.*, 2 IBSMA 341, 87 I.D. 570 (1980).

(2) *Exceptions to SMCRA's requirement for elimination of all highwalls.* There are three specific exceptions to SMCRA's requirement for elimination of all highwalls that have been recognized by OSM, either in the Federal regulations or in State programs. Those three exceptions are referred to in this document as (1) previously mined areas; (2) continuously mined areas; and (3) the AOC alternative.

(a) *Previously mined areas.* The only exception to SMCRA's requirement for complete elimination of all highwalls allowed under the Federal regulations concerns remining operations on previously mined areas. See 30 CFR 816.106, 817.106, and 819.19. The approved Utah program also allows an exception to the requirement for complete elimination of all highwalls for previously mined areas. See Utah Admin. R. 645–301–553.500.

(b) *Continuously mined areas.* Although the Federal regulations do not contain a counterpart provision, OSM has previously approved in certain State programs another exception to the requirement to eliminate all highwalls.

the exception for continuously mined areas. This exception applies only to pre-SMCRA underground mines that have operated continuously from before the effective date of SMCRA (August 3, 1977) to the present. OSM has previously approved such exceptions for the States of Kentucky and West Virginia. Utah now proposes to add this type of an exception to their State program. The proposed Utah exception for continuously mined areas is discussed in detail below at finding No. 3(B).

(c) *AOC alternative to highwall elimination (AOC alternative).* OSM has also recognized a third exception to the requirement to eliminate all highwalls, the AOC alternative. In addition to Utah, the only other State to allow this alternative is New Mexico (45 FR 86459, December 31, 1980). The Utah AOC alternative is found at Utah Admin. R. 645–301–553.650. In this amendment, Utah proposes to modify this alternative. The current proposals regarding the Utah AOC alternative are discussed in detail below at finding No. 3(C).

(B) Utah Admin. R. 645–301–553.510, .520, and .521, Continuously Mined Areas

At Utah Admin. R. 645–301–553.510, 520, and 521, Utah proposes an exception from the requirement for complete highwall elimination for underground mining operations that created highwalls prior to August 3, 1977, the effective date of SMCRA, and continued operations thereafter where the volume of all reasonably available spoil is demonstrated in writing to the Utah Division of Oil, Gas and Mining (Division) to be insufficient to completely backfill the reaffected or enlarged highwall. Under these amended provisions, such highwalls would have to be eliminated to the maximum extent technically practical using all reasonably available spoil.

The Federal backfilling and grading regulations at 30 CFR 817.106(a), (b), and (b)(1) allow an exception from the requirement for complete highwall elimination for underground mining operations that remine highwalls in previously mined areas, which means land affected by surface coal mining operations prior to August 3, 1977, the effective date of SMCRA, that have not been reclaimed to the standards of SMCRA. See 58 FR 3466 (January 8, 1993). These regulations allow for the incomplete elimination of such highwalls where the volume of all reasonably available spoil is insufficient to completely backfill the reaffected or enlarged highwall.

Utah's proposed rules differ from the Federal regulations in that Utah proposes to extend the exception for incomplete highwall elimination to underground mining operations where the highwall was created prior to August 3, 1977, but continued to be used thereafter.

The Director has approved similar proposed regulations for Kentucky and West Virginia (52 FR 49398, 49399, December 31, 1987; 56 FR 21304, 21330–21331, May 23, 1990). Utah's proposed rules and Kentucky's and West Virginia's approved rules address the situation of operators attempting to reclaim face-up entry areas that were created prior to the passage of SMCRA. Many of these face-up entry areas have been in existence for many years and the earthen material necessary to eliminate the face-up entry is either no longer available or has been completely revegetated and its handling and use would cause new environmental damage and disruption. This problem is unique to underground mines where highwall areas do not move with the coal removal operations (as with surface mines) but exist in a static state for many years. The problem is not encountered in surface mines where post-SMCRA operations are continually creating new highwalls rather than extracting coal from pre-SMCRA highwall areas.

In passing SMCRA, Congress addressed the surface impacts of underground mining and surface extraction of coal in a generally similar manner, but it did provide for important differences. In section 516 of SMCRA, Congress affirmatively established certain performance standards applicable to underground mines and incorporated by reference other performance standards at section 515. One of the performance standards incorporated by reference, section 515(b)(3), requires highwall elimination. However, section 516(b)(10) also charges that the Secretary shall make such modifications in the requirements imposed by this subparagraph as are necessary to accommodate the distinct difference between surface and underground coal mining.

For the Kentucky and West Virginia provisions, the Director exercised his authority as the Secretary's designee to consider these distinct differences between surface and underground mines and approved them. The Director reasoned that the provisions provided equitable treatment for pre-SMCRA mines that have operated continuously since before the effective date of SMCRA. They also afford the same variance from AOC requirements as is provided in 30 CFR 817.106 for remining sites where operation of a pre-SMCRA mine has been interrupted and mining was begun again at the sites after the effective date of SMCRA.

For the same reasons discussed above for the Kentucky and West Virginia proposed rules, the Director finds that Utah's proposed rules at Utah Admin. R. 645–301–553.510, .520, and .521 are not inconsistent with the Federal regulations at 30 CFR 817.106(a), (b), and (b)(1) or any other requirements of the Federal regulations or SMCRA, insofar as they apply to underground mining operations that operated prior to August 3, 1977, and have continuously operated since that time. On this basis, the Director approves the proposed rules. However, with respect to continuously mined areas, the Director wishes to emphasize that the exception to the requirement to completely eliminate all highwalls should, like the similar exception for previously mined areas, be narrowly construed and should ensure that the highwall is removed to the maximum extent technically practical. See 48 FR 41720, 41729 (September 16, 1983). Thus, for example, where an underground mining operation has been continuously mined since before the effective date of SMCRA (August 3, 1977) and contains both pre- and post-SMCRA face-up or portal areas, this exception must be understood as applying *only* to the pre-SMCRA face-up areas. Any post-SMCRA portal areas within the same mining operation must comply with the requirement to completely eliminate all highwalls. The Director interprets Utah's proposed exception for continuously mined areas in this limited fashion.

(C) Utah Admin. R. 645–301–553.650, AOC Alternative to Highwall Elimination (AOC Alternative)

The Utah AOC alternative to SMCRA's requirement for the complete elimination of all highwalls was approved by the Secretary of the Interior on December 13, 1982 (47 FR 55672, 55673). Prior to December 13, 1982, Utah had submitted two earlier proposals for an AOC alternative, both of which were rejected by OSM. See 45 FR 70481, 70485–70486 (October 24, 1980) and 46 FR 5899, 5901–5902 (January 21, 1981). In the rulemakings concerning the Utah AOC alternative, OSM made it clear that such an alternative was allowable only where unique topographic conditions existed that caused a conflict between SMCRA's requirement for achieving AOC and the requirement for the complete elimination of all highwalls. OSM

reasoned that while SMCRA repeatedly and consistently requires the elimination of highwalls, it also requires the mined area to be restored to AOC. Thus, when certain unique topographic conditions exist, such as when the area to be mined has natural cliff-type features, these apparently contradictory statutory requirements must be harmonized in a reasonable manner. OSM repeatedly emphasized that the AOC alternative must be treated as a carefully limited exception to SMCRA's requirement to eliminate highwalls. The proposed amendments to Utah's AOC alternative are discussed in detail below.

(1) Requirement for regulatory authority approval of the AOC alternative. Existing Utah Admin. R. 645–301–553.650 requires an operator to obtain Utah's approval for any highwalls that the operator wishes to retain in the postmining landscape. Utah proposes to revise Utah Admin. R. 645–301–553.650 to indicate that a retained highwall will be considered to be consistent with AOC requirements and will not require a variance from the AOC requirements where the operator establishes that the highwall is in compliance with the highwall retention criteria at Utah Admin. R. 645–301–553.651 through .655. Whereas the existing rule requires the operator to obtain Utah's approval of any highwalls proposed to be retained, the revised rule would only require the operator to "establish" that the retained highwall meets the criteria of Utah Admin. R. 645–301–553.651 through 655.

Although there are no Federal regulations that directly correspond to Utah's proposed rules, there are certain Federal regulations that are analogous in that they address procedures for AOC determinations by the regulatory authority. For instance, the Federal regulations at 30 CFR 816.102(k)(3)(ii) and 817.102(k)(1) allow a postmining slope to vary from AOC if approval is obtained from the regulatory authority in accordance with 30 CFR 785.16. These Federal regulations differ from Utah's proposed rule in that the Federal regulations address a variance from AOC while Utah's proposed rule addresses a variance from the requirement to eliminate highwalls. However, these Federal regulations are pertinent in that they set forth a process that the regulatory authority is required to follow in making AOC determinations.

While proposed Utah Admin. R. 645–301–553.650 would require an operator to establish that a highwall could be retained because it would be in compliance with Utah's AOC alternative requirements, the proposed rule does not explicitly state that the operator would submit this documentation to Utah, and Utah would make a written decision on it. Moreover, there is at least one criterion which an operator must establish before obtaining approval to retain a highwall under the AOC alternative that is not specifically included in proposed Utah Admin. R. 645–301–553.650. That criterion is the stability requirement at proposed Utah Admin. R. 645–301–553.523 (discussed in further detail in finding No. 3(D) below).

The analogous Federal regulations at 30 CFR 816.102(k)(3)(ii) and 817.102(k)(1) explicitly require operators to obtain the regulatory authority's approval for determinations relating to AOC. Because Utah's proposed rule at Utah Admin. R. 645–301–553.650 does not explicitly require operators to obtain Utah's approval of retained highwalls, the Director finds that the proposed rule is inconsistent with the Federal regulations at 30 CFR 816.102(k)(3)(ii) and 817.102(k)(1). The Director does not approve proposed Utah Admin. R. 645–301–553.650 and requires Utah to revise it to require that, prior to obtaining Utah's approval for highwalls to be retained, the operator must establish and Utah must find in writing that any proposed highwall will comply with the AOC criteria at Utah Admin. R. 645–301–553.651 through 655 and the stability requirement at Utah Admin. R. 645–301–553.523.

(2) Utah Admin. R. 645–301–553.651, height and length requirements of retained highwalls. At Utah Admin. R. 645–301–553.651, Utah proposes that in order for a retained highwall to be considered to be consistent with AOC, the highwall cannot be significantly greater in length than any natural cliff-like escarpments removed or physically altered by the mining process and cannot be significantly greater in height than existing cliffs in the surrounding area.

Utah's proposed rule sets a standard for the length of a retained highwall that is based upon the length of natural cliffs or escarpments that are disturbed by the mining operation. This differs from Utah's proposed highwall height standard that is based upon the height of undisturbed cliffs or escarpments in the surrounding area.

The length component of proposed Utah Admin. R. 645–301–553.651 is not inconsistent with section 515(b)(3) of SMCRA, which requires mining operations to restore the land to AOC. However, the height component of proposed Utah Admin. R. 645–301–553.651 is inconsistent with the assumptions upon which the Secretary previously based his approval of Utah's AOC alternative. Although the term "surrounding area" is unchanged from the existing rule that the Secretary approved as part of the Utah AOC alternative, it is clear from the preamble discussions of the existing rule that the Secretary approved Utah's AOC alternative only for those cases where the retained highwall actually resulted in AOC (45 FR 70481, 70485–70486, October 24, 1980; and 46 FR 5899, 5901–5902, January 21, 1981). Proposed Utah Admin. R. 645–301–553.651 would allow retained highwalls to have heights that were not necessarily comparable with those of cliffs or escarpments that were replaced or disturbed by the mining operations. Because the proposed rule would allow the retention of highwalls that were significantly greater in height than those replaced or disturbed by the mining operations, it would result in a condition that was not AOC. This is not in accordance with the approved Utah AOC alternative and is less stringent than section 515(b)(3) of SMCRA, which requires mining operations to restore the land to AOC.

For these reasons, the Director finds that proposed Utah Admin. R. 645–301–553.651 is not in accordance with the Secretary's approval of the Utah AOC alternative and is less stringent than section 515(b)(3) of SMCRA. The Director does not approve the proposed rule because it would allow the height of retained highwalls to be based upon the height of undisturbed cliffs or cliff-like escarpments in the surrounding area, rather than the height of cliffs or cliff-like escarpments that were replaced or disturbed by the mining operations. The Director requires Utah to submit a proposed amendment for highwall retention and AOC at Utah Admin. R. 645–301–553.651 restricting the height of retained highwalls to the height of cliffs or cliff-like escarpments that were replaced or disturbed by the mining operations.

(3) Utah Admin. R. 645–301–553.652, replacement of a preexisting cliff or similar natural premining feature with a retained highwall, and date of applicability of these rules. At Utah Admin. R. 645–301–553.652, Utah proposes that in order for a retained highwall to be consistent with AOC requirements, the retained highwall must replace a preexisting cliff or similar natural premining feature and resemble the structure, composition, and function of the natural cliff it replaces or enhances.

As discussed in finding No. 4(b)(i) of the October 24, 1980, Federal Register

(45 FR 70481, 70486), the Secretary found in his decision on Utah's originally proposed AOC alternative that the mandate of section 515(b)(3) of SMCRA to restore the land to AOC with all highwalls eliminated contains an inherent contradiction when it is applied to specific areas of Utah with its natural benches and steep topography. In such terrain, the elimination of highwalls would not restore the land to AOC, since the original contour was a natural cliff that was similar in its contour to highwall. The Secretary decided to harmonize these apparently contradictory requirements by approving the Utah AOC alternative as a carefully limited exception to SMCRA's requirement for highwall elimination for the above-described situations. See 45 FR 70481, 70485–70486 (October 24, 1980); 46 FR 5899, 5901–5902 (January 21, 1981); 47 FR 55672, 55673 (December 13, 1982).

After the Secretary's approval of the Utah AOC alternative, the Utah Board of Oil, Gas and Mining interpreted the AOC alternative to allow the retention of highwalls when no similar natural features existed in the disturbed area prior to mining. On January 9, 1991, OSM sent a letter to Utah in accordance with 30 CFR 732.17 notifying Utah that the Board's interpretation was inconsistent with the assumptions upon which the Secretary based his approval of the Utah AOC alternative. OSM stated:

> Since the Utah rule as interpreted by the Board no longer meets Federal requirements, the State program must be amended to restore consistency with SMCRA. Specifically, the State must require that all highwalls created or affected by a mining operation be eliminated except to the extent that they qualify for the remining exemption or replace natural features of a similar nature. Any residual highwalls must closely resemble natural premining features in size, form and function.
>
> Also, in the February 12, 1990, decision in *NWF v. Lujan*, the U.S. District Court for the District of Columbia ruled that regulations which contradict a statutory provision cannot be considered as being of any effect for any portion of the time they existed (Mem. Op. at 35–42). Therefore, since highwall elimination is a fundamental requirement of SMCRA, the amendment must include a provision stating that its requirements apply to all highwalls created or affected after [August 3, 1977,] the effective date of SMCRA.

Therefore, in this 30 CFR part 732 notification, OSM addressed the requirements for Utah (1) to submit a State program amendment that allowed highwalls to be retained pursuant to the Utah AOC alternative only when they replaced natural features of a similar nature and closely resembled natural premining features in size, form, and function, and (2) to make such highwall retention requirements applicable to all highwalls created or reaffected after August 3, 1977. OSM addresses those two requirements separately below.

(a) *Replacement of a preexisting cliff or similar natural premining feature with a retained highwall.* The Director finds that proposed Utah Admin. R. 645–301–553.652, which allows highwalls to be retained only if they replace a preexisting cliff or similar natural premining feature, is in accordance with the Secretary's approval of the Utah AOC alternative and section 515(b)(3) of SMCRA, which requires operators to restore the AOC of the land.

(b) *Applicability date.* On November 6 and 7, 1991, Utah met with OSM and discussed this highwall retention issue (administrative record No. UT–693). In response to the 30 CFR part 732 letter, Utah on April 30, 1992, submitted the proposed amendment to the highwall retention and reclamation rules at Utah Admin. R. 645–100–200 and 645–103–553. through 553.655 that are the subject of this Federal Register notice. In accordance with its interpretation of discussions at the November 6 and 7, 1991, meeting, Utah proposed that it would not apply the proposed rules requiring the backfilling and grading of highwalls to mine sites or structures for which reclamation had been initiated prior to the date Utah's proposed rules are put into effect.

On September 10, 1992, OSM sent to Utah an issue letter for this proposed amendment in which it reconsidered its position for the date of applicability of Utah's proposed highwall retention and reclamation rules. OSM stated that incomplete highwall elimination by Utah mining operations would be allowed pursuant to the currently approved Utah AOC alternative only if prior to June 2, 1992, the date of OSM's proposed rule Federal Register notice for the amendment, final backfilling and grading was completed and the bond was released under phase I requirements in accordance with the State counterpart of section 519(c)(1) of SMCRA.

On September 30, 1992, Utah resubmitted the proposed highwall retention amendment and indicated only that it had "taken note" of OSM's comments regarding the applicability date for the proposed rules.

Although OSM has seriously considered the alternate applicability dates discussed in the November 6 and 7, 1991, meeting and the September 10, 1992, issue letter, it now, after further review and analysis, reaffirms, with clarification and slight modification, its original position for an applicability date of August 3, 1977, as stated in the January 9, 1991, 30 CFR part 732 letter to Utah. OSM believes that August 3, 1977, is the appropriate applicability date, as was stated in the January 9, 1991, letter. However, since the Utah program did not contain an approved AOC alternative prior to December 13, 1982 (47 FR 55672, 55673), the applicability date for proposed Utah Admin. R. 645–301–553.652, which explicitly limits the Utah AOC alternative, cannot be any earlier than that date. Accordingly, OSM is requiring that the added provision at Utah Admin. R. 645–301–553.652 have an applicability date of December 13, 1982. The applicability date of Utah Admin. R. 645–301–553.652 is the same as the applicability date of the AOC alternative itself and the requirements of Utah Admin. R. 645–301–553.652 must apply to any highwall retained pursuant to the Utah AOC alternative.

Prior to December 13, 1982, the Utah program did not contain an approved AOC alternative. Therefore, no such alternative to the requirement to completely eliminate all highwalls was available to Utah operators prior to December 13, 1982. Accordingly, unless a particular highwall qualified for the Utah exception for remining operations on previously mined areas (currently at Utah Admin. R. 645–301–553.500), the approved Utah program required the elimination of all highwalls between the dates of August 3, 1977, and December 13, 1982.

The Director believes that an applicability date of December 13, 1982, for proposed Utah Admin. R. 645–301–553.652 is not only allowed by, but is mandated by SMCRA. As discussed in finding No. 3(A) above, SMCRA's requirement for the elimination of all highwalls was deemed by Congress to be one of the law's most essential environmental protection performance standards. Accordingly, any exception from this requirement must be carefully limited in scope. The Utah AOC alternative that OSM approved on December 13, 1982, was approved based upon that understanding.

The Director does not believe that this determination regarding the applicability date of December 13, 1982, constitutes retroactive rulemaking because the requirements of Utah Admin. R. 645–301–553.652, if not explicitly stated in the Utah program prior to submission of this amendment, were implicitly part of the Utah program since the time the Utah AOC alternative was first approved by OSM. As

discussed in finding Nos. 3(A) and 3(C) above, OSM has consistently maintained that this AOC alternative is limited to circumstances where SMCRA's AOC requirement is actually in conflict with SMCRA's requirement to eliminate all highwalls. Obviously, that situation does not arise unless the disturbed area contains premining features that resemble cliffs or highwalls. If the premining topography of a mine does not contain such features, then the AOE alternative has no application. An operator who fails to completely eliminate a highwall under such circumstances violates both SMCRA's AOE requirement and its requirement to eliminate all highwalls. Any applicability date of proposed Utah Admin. R. 645–301–553.652 subsequent to December 13, 1982, would allow Utah operators to violate two of SMCRA's most essential environmental protection performance standards.

Even if this decision regarding the applicability date of Utah Admin. R. 645–301–553.652 could be construed to be retroactive rulemaking, it is in accordance with case law regarding retroactivity. See e.g. *Bradley* v. *Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). *See also Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). By explicitly requiring that a retained highwall replace a preexisting cliff or similar premining feature and resemble the structure, composition, and function of the natural cliff it replaces, proposed Utah Admin. R. 645–301–553.652 does nothing more than clarify what was always a necessary precondition before a Utah operator could take advantage of the Utah AOC alternative previously approved by OSM. Accordingly, the present amendment is distinguishable from the regulation at issue in *United States* v. *Shelton Coal Corp.*, 647 F. Supp. 264 (W.D. Va. 1986), *Aff'd.* 829 F.2d 1336 (4th Cir. 1987), where the court found that an OSM regulation could not be applied retroactively because it constituted a change in settled law. Instead, the present amendment is more like the regulation at issue in *United States* v. *Lambert Coal Co.*, 649 F. Supp. 1470 (W.D. Va. 1986), *aff'd* 28 ERC 1871 (4th Cir. 1988), where the court found that retroactive application of an OSM regulation was permissible "because the new regulation [did] not overrule or change the prior regulations." *United States* v. *Lambert Coal Co.*, 649 F. Supp. at 1474.

For these reasons, the Director finds that Utah's proposal to not apply proposed Utah Admin. R. 645–301–553.652 to the approved Utah AOC alternative until it is put into effect in the Utah program is inconsistent with the basis of the Secretary's approval of the Utah AOC alternative and is less stringent than section 515 of SMCRA. Therefore, the Director does not approve Utah's applicability date for its proposed rule at Utah Admin. R. 645–301–553.652. With regard to proposed Utah Admin. R. 645–301–553.652, the requirements of OSM's January 9, 1991, 30 CFR Part 732 letter still stand. Thus, the Director will interpret the Utah provision at Utah Admin. R. 645–301–553.652 as having an applicability date of December 13, 1982. In addition, the Director requires Utah to submit an amendment stating that the requirement at proposed Utah Admin. R. 645–301–553.652 has an applicability date of December 13, 1982, and applies to any highwall retained pursuant to the AOC alternative.

(4) *Utah Admin. R. 645–301–553.653, modifications to retained highwalls restoring cliff-type habitats required by premining flora and fauna.* At Utah Admin. R. 645–301–553.653, Utah proposes to require that a retained highwall will be considered to be consistent with AOC where the operator establishes, in addition to other requirements, that the retained highwall is modified if necessary to restore cliff-type habitats required by the flora and the fauna existing prior to mining.

The additional criteria at proposed Utah Admin. R. 645–301–553.653 for obtaining approval of an AOC alternative to SMCRA's requirement to eliminate highwalls provide clarity for Utah's program.

There are no direct counterparts to proposed Utah Admin. R. 645–301–553.653 in the Federal regulations or SMCRA. The Director finds that this proposed rule is not inconsistent with the Federal permanent program performance standards for surface and underground mining activities at 30 CFR Parts 816 and 817, which set forth backfilling and grading requirements for both surface and underground mining operations; with section 515(b)(2) of SMCRA, which requires operators to restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses; and with section 515(b)(3) of SMCRA, which requires operators to restore the AOC of the land. The Director approves Utah's proposed rule.

(5) *Utah Admin. R. 645–301–553.654, compatibility of retained highwalls with the approved postmining land use and visual attributes of the area.* At newly-created Utah Admin. R. 645–301–553.654, Utah proposes to require that a retained highwall will be considered to be consistent with AOC where the operator establishes that the retained highwall is compatible with both the visual attributes of the area and the approved postmining land use.

The visual attribute requirement exists at Utah Admin. R. 645–301–553.652, and Utah proposes to delete it there and incorporate it at new Utah Admin. R. 645–301–553.654. The Secretary approved this requirement on December 13, 1982 (47 FR 55672), as part of Utah's AOC alternative.

The proposed requirement that the retained highwall be compatible with the approved postmining land use has a general counterpart in the Federal regulations at 30 CFR 784.15, which addresses operator reclamation plans and compatibility of reclaimed lands for postmining land uses. Also, section 515(b)(2) of SMCRA requires that affected lands be restored to a condition capable of supporting the uses that it was capable of supporting prior to mining, or higher or better uses, and section 515(b)(3) requires backfilling and grading operations to achieve an ecologically sound land use compatible with the surrounding region.

The Director finds that proposed Utah Admin. R. 645–301–553.654 is not inconsistent with the Federal regulations at 30 CFR 784.15 and sections 515(b) (2) and (3) of SMCRA. The Director approves Utah's proposed rule.

(D) Utah Admin. R. 645–301–553.500 and .523, Highwalls in General; 1.3 Static Safety Factor and Alternative Stability Criteria

At Utah Admin. R. 645–301–553.523, Utah proposes to require that any operator wishing to leave in the postmining landscape a highwall remnant or a retained highwall, whether in connection with a previously mined area, a continuously mined area, or the AOC alternative, must demonstrate to the Division that the highwall remnant or retained highwall would not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and prevent slides. Under the proposed rule, an operator could, in lieu of the 1.3 static safety factor and slide prevention criterion, propose an alternative stability criterion for the Division's approval that would demonstrate that the highwall remnant or retained highwall is stable and does not pose a hazard to the public health and safety.

The Federal regulations at 30 CFR 816.102(a)(3) and 817.102(a)(3) require that disturbed areas be backfilled and

graded to achieve a postmining slope that does not exceed either the angle of respose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides. The Federal regulations at 30 CFR 816.106(b)(3) and 817.106(b)(3) require that any highwall remnant on a remined area shall be stable and not pose a hazard to the public health and safety or to the environment. These regulations also require the operator to demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable. Stability requirements are especially important in steep-slope areas where instability can create very serious environmental and public health and safety problems. *See* 44 FR 14902, 15291 (March 13, 1979).

With three exceptions, proposed Utah Admin. R. 645–301–553.500 and .523 have requirements that are consistent with the Federal regulations at 30 CFR 816.102(a)(3), 817.102(a)(3), 816.106(b)(3), and 817.106(b)(3).

The first exception is that Utah titles section Utah Admin. R. 645–301–553.500 as "[p]reviously mined areas" even though subsection Utah Admin. R. 645–301–553.523 addresses highwall remnants or retained highwalls in connection with continuously mined areas and the AOC alternative, as well as highwalls in connection with previously mined areas. The Director finds that Utah's proposed Utah Admin. R. 645–301–553.523 is less effective than the Federal regulations at 30 CFR 816.106 and 817.106 in the respect that the title for proposed Utah Admin. R. 645–301–553.500 is inconsistent with the content of proposed Utah Admin. R. 645–301–553.523 and could cause misinterpretation of the latter rule. In addition, as applied to the AOC alternative, since the stability criteria are placed in a separate section, it is not clear that such criteria specifically apply to highwalls retained in accordance with the AOC alternative.

The second exception is that proposed Utah Admin. R. 645–301–553.523, with respect to any alternative highwall stability criterion proposed by an operator and approved by Utah, requires that a highwall remnant or retained highwall be stable and not pose a hazard to the public health and safety. The Federal regulations at 30 CFR 816.106(b)(3) and 817.106(b)(3) require that, in addition to the public health and safety, the highwall remnant or retained highwall must not pose a hazard to the environment. The Director finds that Utah's proposed Utah Admin. R. 645–301–553.523 is less effective than the Federal regulations at 30 CFR 816.106(b)(3) and 817.106(b)(3) in the respect that it would allow Utah to approve alternative stability criteria that could pose a hazard to the environment.

The third exception for proposed Utah Admin. R. 645–301–553.523 is that an operator deciding not to propose to Utah an alternative highwall stability criterion must ensure any highwall remnant or retained highwall does not exceed the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and prevent slides. Utah's inclusion of the phrase "angle of repose" is inappropriate in this context. As generally defined, the phrase "angle of repose" applies only to loose unconsolidated materials. See A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, Bureau of Mines (1968). Therefore, unless the geologic strata exposed in the highwall face are composed of such materials, the phrase has no relevance in the context of a highwall remnant or retained highwall. The Director finds that Utah Admin. R. 645–301–553.523 is less effective than the Federal regulations at 30 CFR 816.102(a)(3) and 817.102(a)(3) in the respect that the phrase "not to exceed either the angle of repose or such lesser slope as is necessary to" confuses the rule's meaning and could cause misinterpretation of the rule.

In addition, the Director emphasizes that, in all cases, the Federal regulations at 30 CFR 816.102(a)(3) and 817.102(a)(3) require the backfill material at the base or against a highwall to have a minimum long-term static safety factor of 1.3 and prevent slides. The Director recognizes that a highwall remnant extending above the backfill material does not have to achieve the 1.3 minimum long-term static safety factor. However, the Federal regulations at 30 CFR 816.106(b)(3) and 817.106(b)(3) require (1) that any highwall remnant be stable and not pose a hazard to the public health and safety or to the environment and (2) that an operator demonstrate to the satisfaction of the regulatory authority that the highwall remnant is stable.

At Utah Admin. R. 645–301–553.523, Utah uses both the terms "highwall remnant" and "retained highwall" with respect to the applicability of an alternative stability criterion. While Utah does not define the term "retained highwall" in its rules, it does define the term "highwall remnant" as meaning "[t]hat portion of highwall that remains after backfilling and grading of a remaining permit area." Utah's definition of "highwall remnant" is identical to the Federal definition at 30 CFR 701.5. Therefore, the Director interprets Utah's proposed term "retained highwall" to be analogous to the term "highwall remnant" and understands that any alternative stability criterion proposed by an operator to Utah will apply only to that portion of highwall that remains after backfilling and grading, and not the backfill material at the base of or against the highwall.

Provided the terms "highwall remnant" and "retained highwall" are interpreted in this analogous fashion with respect to an alternative stability criterion, the Director finds proposed Utah Admin. R. 645–301–552.523 to be no less effective than the Federal regulations at 30 CFR 816.102(a)(3), 817.102(a)(3), 816.106(b)(3), and 817.106(b)(3).

For the reasons discussed above, the Director does not approve proposed Utah Admin. R. 645–301–553.500 and .523 and requires Utah to (1) eliminate the inconsistency between the title "previously mined areas" at Utah Admin. R. 645–301–553.500 and the content of subsection Utah Admin. R. 645–301–553.523, which addresses not only highwall remnants in areas that were previously mined, but also highwall remnants and retained highwalls in connection with continuously mined areas and the AOC alternative, and to otherwise amend their program to clarify that the stability criteria of proposed Utah Admin. R. 645–301–553.523 apply to the AOC alternative at Utah Admin. R. 645–301–553.650, (2) revise Utah Admin. R. 645–301–553–523 to specify that, in addition to the public health and safety, the highwall remnant or retained highwall must not pose a hazard to the environment, and (3) revise Utah Admin. R. 645–301–553.523 to delete the phrase "not to exceed either the angle of repose or such lesser slope as is necessary to."

IV. Summary and Disposition of Comments

1. Public Comments

In response to the request for public comments, OSM received one comment on the portion of the proposed Utah amendment dealing with an exception for continuously mined areas to the requirement to completely eliminate highwalls. The commenter supported this portion of the amendment and urged OSM to approve it.

The commenter cited two decisions of the United States District Court for the District of Columbia as holding that SMCRA's provisions, and, specifically, SMCRA's grading and highwall

elimination requirements, cannot be applied retroactively. The commenter further cited two decisions of the Interior Board of Surface Mining and Reclamation Appeals for the same proposition.

The commenter also stated that the proposed amendment was in accordance with congressional direction, as set forth in section 516(a) of SMCRA, 30 U.S.C. 1266(a), to consider the distinct differences between surface and underground coal mining operations when promulgating rules and regulations directed toward the surface effects of underground mining operations.

The commenter further stated that section 516(b)(2) of SMCRA, 30 U.S.C. 1266(b)(2), provides a distinct and separate requirement for face-up areas, which requires only that an operator seal all portals, entryways, drifts, shafts, or other openings between the surface and underground mine working when no longer needed for the conduct of mining operations.

Finally, the commenter stated that OSM has approved similar provisions in West Virginia, Kentucky, and Virginia. As addressed in finding No. 3(B) above, the Director has found that this portion of the Utah amendment is not inconsistent with the SMCRA or the Federal regulations. While the Director is approving this portion of the Utah amendment, he disagrees with certain arguments raised by the commenter. Set forth below are the Director's responses to each of the commenter's arguments.

The commenter stated that section 516(b)(2) of SMCRA, 30 U.S.C. 1266(b)(2), provides a distinct and separate requirement for face-up areas and requires only that an operator seal all portals, entryways, drifts, shafts, or other openings between the surface and underground mine working when no longer needed for the conduct of mining operations. The commenter's suggestion that an operator need only comply with section 516(b)(2) of SMCRA to meet SMCRA's environmental protection performance standards for face-up areas is incorrect. Subsection (b)(10) of the same section of SMCRA makes clear that the environmental performance standards established under section 515 must be met by underground operators, in addition to the performance standards set forth at section 516. One of the many performance standards established by section 515 is the requirement for complete elimination of highwalls. See section 515(b)(3). Moreover, the elimination of highwalls was one of the standards Congress felt was critical to the elimination of the worst effects of coal mining. See e.g., *National Wildlife Federation* v. *Lujan*, 733 F. Supp. 419, 442 (D.D.C. 1990).

The commenter cited the decision of the United States District Court for the District of Columbia in *In Re: Surface Mining Litigation*, 452 F. Supp. 327, 339 (D.D.C. 1978) as holding that "absent an explicit and unmistakable command to the contrary, SMCRA's statutory provisions cannot be applied retroactively." The Director disagrees with the commenter's interpretation of this case. The decision involved a section of the interim program regulations unrelated to the issue of highwall retention, 30 CFR 710.11, dealing with design criteria for pre-existing structures and facilities. The court did not require operators to dismantle preexisting structures and facilities to meet the specific design criteria of the interim regulations.

However, the court emphasized that the performance standards must be met and clarified that such structures and facilities would have to be reconstructed if they did not meet the performance standards. Thus, the case stands for the proposition that structures and facilities existing prior to SMCRA must meet performance standards, even though they may not be required to comply with specific design criteria, of the interim program. The requirement to completely eliminate highwalls is a performance standard. Accordingly, this case does not support the commenter's argument.

The commenter also cited another decision by the same court, *In Re: Permanent Surface Mining Regulation Litigation*, 21 ERC 1193 (D.D.C. 1984), as holding "that Congress did not intend for the grading and highwall elimination requirements of section 515(b)(3) to encompass pre-existing highwalls." Clearly, the "pre-existing highwalls" to which the court referred were those highwalls in existence and abandoned without being reclaimed prior to the effective date of SMCRA, August 3, 1977. See e.g. *In Re: Permanent Surface Mining Regulation Litigation*, 620 F. Supp. 1519, 1572 (D.D.C. 1985). See also *National Wildlife Federation* v. *Lujan*, 773 F. Supp. 419, 439–441 (D.D.C. 1990). It is thus apparent that the court's decision cited by the commenter has no application to a continuously mined area. That situation simply was not contemplated by the court. Moreover, OSM does not interpret its rules governing remining in previously mined areas to apply to continuously mined areas. "[W]here there are continuous operations under a permit, this is not a remining situation. * * * these special remining rules do not apply to operations in areas where there has been past compliance with the Act [SMCRA] or there is a continuing responsibility under the Act" (47 FR 51316, 51320, November 12, 1982). See also 58 FR 3466, 3467 (January 8, 1993).

The commenter also stated that "[e]ven before the district court's decision, the Interior Board of Surface Mining Appeals held that highwall elimination requirements could not be applied retroactively," citing *Cedar Coal Co.*, 1 IBSMA 145 (April 20, 1979) and *Miami Springs Properties*, 2 IBSMA 399 (December 23, 1980). The commenter's argument regarding these two Board decisions is misplaced. Neither one of these Board decisions held that SMCRA's highwall elimination requirements could not be applied retroactively.

Both of these Board decisions interpreted a provision of the interim program standards governing backfilling and grading requirements at 30 CFR 715.14. Both decisions emphasized that operators were required to comply with the backfilling and grading performance standards of the interim program, despite the fact that their operations preceded SMCRA. However, the Board interpreted an operator's duty to comply with the requirements of 30 CFR 715.14(b)(1)(ii),which demanded the complete elimination of highwalls in remining situations, as conditioned upon whether disturbance of the pre-existing highwall caused an adverse physical impact.

Although OSM at one time adopted this "adverse physical impact" standard and incorporated it into the permanent program regulations (48 FR 41720, September 16, 1983), OSM later suspended (50 FR 257, January 3, 1985), and then removed (51 FR 41734, November 18, 1986), the adverse physical impact standard from the permanent program regulations in response to a court order entered pursuant to a joint motion by parties in the case of *In Re: Permanent Surface Mining Regulation Litigation*, Docket No. 79–1144 (D.D.C. December 3, 1984). In its November 18, 1986, rulemaking, OSM made clear that the two Board decisions relied upon by the commenter, despite previous interpretations to the contrary, have no application to the backfilling and grading requirements of the permanent program regulations, as modified therein. See 51 FR 41734, 41735 (November 18, 1986). OSM explained that the permanent program regulations, as modified, require an operator engaged in remining operations to eliminate the preexisting highwall to the maximum extent practical whenever the highwall is reaffected or enlarged. It is

thus not necessary for the remining operation to have an adverse physical impact upon a pre-existing highwall before the operator is required to eliminate the highwall to the maximum extent practical.

Thus, despite the commenter's arguments to the contrary, the Board decisions cited by the commenter do not hold that highwall elimination requirements cannot be applied retroactively. Moreover, as discussed above, OSM does not interpret its provisions governing remining operations as encompassing continuously mined areas. See 47 FR 51316, 51320 (November 12, 1982).

The Director does agree with two points made by the commenter. First, the Director acknowledges that OSM has approved similar provisions to the Utah proposal in Kentucky (52 FR 49398, December 31, 1987), and West Virginia (56 FR 21304, May 23, 1990). Indeed, the Director has discussed the rationale for approving the Kentucky and West Virginia provisions at length in finding No. 3(B). However, contrary to the commenter's assertion, the Director has not approved similar provisions in Virginia.

The Director further agrees with the commenter's statement that the proposed amendment is in accordance with congressional direction, as set forth in section 516(a) of SMCRA, 30 U.S.C. 1266(a), to consider the distinct differences between surface and underground coal mining operations when promulgating rules and regulations directed toward the surface effects of underground mining operations. Once again, the Director discusses this at length in finding No. 3(B).

2. Agency Comments

Pursuant to section 503(b)(1) of SMCRA and 30 CFR 732.17(h)(11)(i), the Director solicited comments from the Administrator of the Environmental Protection Agency (EPA), the Secretary of Agriculture, and various other Federal agencies with an actual or potential interest in the Utah program.

By letters dated June 4, 1992, and November 2, 1992, the Army Corps of Engineers responded that the proposed changes to the Utah program were satisfactory to that agency (administrative record Nos. UT–768 and UT–798).

By letter dated May 28, 1992, the Bureau of Land Management responded that it reviewed the proposed amendment for impacts to the effective management of Federal coal resources and found no conflicts (administrative record No. UT–765).

By letters dated May 19, 1992, and November 2, 1992, the Bureau of Mines responded that it had no comments on the proposed amendment (administrative record Nos. UT–763 and UT–799).

By letter dated November 4, 1992, the Fish and Wildlife Service responded that it found nothing of significant concern in the proposed amendment (administrative record No. UT–804).

By letter dated June 2, 1992, the Soil Conservation Service responded that it had no specific comments (administrative record No. UT–766).

By telephone conversation on June 18, 1992, the U.S. Forest Service (USFS) stated that it did not have any concerns relative to USFS interests (administrative record No. UT–769).

By letter dated July 10, 1992, the Mine Safety and Health Administration (MSHA) expressed concern over a potential conflict of MSHA's regulations with Utah's refuse pile rules that Utah included in the amendment but did not propose to revise (administrative record No. UT–772). In particular, MSHA was concerned because Utah Admin. R. 645–301–553.250 does not mention refuse pile requirements that are included in MSHA's regulations at 30 CFR 77.215(h). MSHA recommended that a statement regarding the MSHA requirements be added to Utah's rules.

MSHA's regulation at 30 CFR 77.215(h) addresses compaction, slope, and minimum safety factor for refuse piles. OSM's regulation at 30 CFR 816.83 requires that refuse piles meet the requirements of 30 CFR 77.214 and 77.215.

Utah Admin. R. 645–301–260 incorporates by reference the refuse pile requirements of Utah Admin. R. 645–301–536.900. The referenced rule, which Utah did not submit as part of the amendment, does require that refuse piles meet the requirements of MSHA's regulations at 30 CFR 77.214 and 30 CFR 77.215. Therefore, although Utah does not mention MSHA's 30 CFR 77.215(h) requirements in Utah Admin. R. 645–301–250, Utah does incorporate them by reference at Utah Admin. R. 645–301–553.260 and 536.900. On this basis, it is not necessary for the Director to require Utah to revise its program in response to MSHA's comment.

By a second letter dated January 13, 1993, MSHA commented that Utah's September 30, 1992 revised proposed amendment did not appear to conflict with any current MSHA regulations (administrative record No. UT–814). MSHA also quoted proposed Utah Admin. R. 645–301–553.523 noting that Utah's requirements are more stringent than title 30 of the Code of Federal Regulations, which includes both MSHA and OSM's regulations. MSHA further stated that other parts of the amendment concerning grading, drainage, and contour restoration did not appear to be in conflict with title 30 of the Code of Federal Regulations. The Director does not agree with MSHA's assessment that proposed Utah Admin. R. 645–301–553.523 is more stringent than title 30 of the Code of Federal Regulations. As discussed in finding No. 3(D) above, the Director is requiring Utah to amend proposed Utah Admin. R. 645–301–553.523 to be consistent with the Federal regulations at 30 CFR 816.102(a)(3), 817.102(a)(3), 816.106(b)(3), and 817.106(b)(3).

3. State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation (ACHP)

Pursuant to 30 CFR 732.17(h)(4), OSM is required to solicit comments from the SHPO and ACHP for all amendments that may have an effect on historic properties. By letters dated May 14, 1992, and October 21, 1992, the Director solicited comments from these offices (administrative record Nos. UT–760 and UT–792). By letter dated May 21, 1992, the Utah State Historic Preservation Office responded that it has previously concurred with OSM's recommendations for the project and had no additional comment at that time (administrative record No. UT–764). The ACHP did not comment on the proposed amendment.

4. U.S. Environmental Protection Agency (EPA) Concurrence

Pursuant to 30 CFR 732.17(h)(11)(ii), the Director is required to obtain the written concurrence of the Administrator of the EPA with respect to any provisions of a State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 et seq.) and the Clean Air Act, as amended, (42 U.S.C. 7401 et seq.). EPA gave written concurrence with the proposed amendment by letter dated November 17, 1992 (administrative record No. UT–805).

EPA noted that (1) Utah Admin. R. 645–301–553.220 allows for the placement of spoil in the area outside the mined-out surface area, (2) Utah Admin. R. 645–301–553.260 allows for the disposal of coal processing waste and underground development waste in the mined-out surface area, and (3) the activities described in the aforementioned rules and in Utah Admin. R. 645–301–553.631 (mountaintop removal) could fall under the category of mine wastes discharged

into waters of the United States for the primary purpose of waste disposal but with the effect of fill.

EPA further noted that the Clean Water Act (CWA) requires that all point source discharges of pollutants into waters of the United States comply with water quality standards and technology-based requirements implemented through an EPA or State issued National Pollutant Discharge Elimination System (NPDES) permit. These standards shall be such as to protect the public health or welfare, enhance the quality of water, and serve the purposes of the CWA. In addition, a permit for dredge and fill may be required under section 404 of CWA.

The Director acknowledges EPA's statements.

EPA concurred with the proposed amendment and found that Utah's proposed rule revisions demonstrate the legal authority, administrative capability, and technical conformity with NPDES regulations necessary to maintain water quality standards promulgated under the CWA, as amended (33 U.S.C. 1251 et seq.).

V. Director's Decision

Based on the above findings, the Director approves, with certain exceptions and additional requirements, the proposed amendment that Utah submitted on April 10, 1992, and revised on September 30, 1992.

As discussed in finding No. 3(C)(1), the Director does not approve proposed Utah Admin. R. 645–301–553.650 and requires Utah to revise it to require that, prior to obtaining Utah's approval for highwalls to be retained, the operator must establish and Utah must find in writing that any proposed highwall will comply with the AOC criteria at Utah Admin. R. 645–301–553.651 through 655 and the stability requirement at Utah Admin. R. 645–301–553.523.

As discussed in finding No. 3(C)(2), the Director does not approve proposed Utah Admin. R. 645–301–553.651 and requires Utah to revise it to restrict the height or retained highwalls to the height of cliffs and cliff-like escarpments that were replaced or disturbed by the mining operations.

As discussed in finding No. 3(C)(3), the Director (1) does not approve Utah's proposal to not apply proposed Utah Admin. R. 645–301–533.652 until it is put into effect in the Utah program, and (2) requires Utah to revise proposed Utah Admin. R. 645–301–553.652 to state that it has an applicability date of December 13, 1982, and applies to any highwall retained pursuant to the AOC alternative.

As discussed in finding No. 3(D), the Director approves Utah Admin. R. 645–301–553.500 and .523 and requires Utah to (1) eliminate the inconsistency between the title "previously mined areas" at Utah Admin. R. 645–301–553.500 and the content of subsection Utah Admin. R. 645–301–553.523, which addresses not only highwall remnants in areas that were previously mined, but also highway remnants and retained highwalls in connection with continuously mined areas and the AOC alternative, and to otherwise amend their program to clarify that the stability criteria of proposed Utah Admin. R. 645–301–553.523 apply to the AOC alternative at Utah Admin. R. 645–301–553.650, (2) revise Utah Admin. R. 645–301–553.523 to specify that, in addition to the public health and safety, a highwall remnant or retained highwall must not pose a hazard to the environment, and (3) revise Utah Admin. R. 645–301–553.523 to delete the phrase "not to exceed either the angle of repose or such lesser slope as is necessary to."

Except as noted, the Director approves the rules with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

The Federal regulations at 30 CFR part 944, which codify decisions concerning the Utah program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Effect of Director's Decision

Under section 503 of SMCRA, 30 U.S.C. 1253, a State may not exercise jurisdiction over surface coal mining and reclamation operations unless it has a State program approved by the Secretary. Similarly, 30 CFR 732.17 requires a State to submit any alteration of an approved State program to OSM for approval. The Federal regulation at 30 CFR 732.17(g) provides that no change in the law or regulations that make up a State program shall take effect for purposes of a State program until approved by OSM as an amendment.

This prohibits a State from making any unilateral change in its approved State program. Any change in a State program is not enforceable by the State until approved by OSM. In oversight of the Utah program, the Director will recognize only the statutes, regulations, and other materials approved by OSM, together with any consistent implementing policies, directives, and other materials, and will require that Utah enforce only such provisions.

VII. Procedural Determinations

1. Executive Order 12291

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7, and 8 of Executive Order 12291 (Reduction of Regulatory Burden) for actions related to approval or conditional approval of State regulatory programs, actions, and program amendments. Therefore, preparation of a regulatory impact analysis is not necessary, and OMB regulatory review is not required.

2. Executive Order 12278

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 12550) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

3. National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

4. Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 et seq.).

5. Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The State submittal that is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

List of Subjects in 30 CFR 944

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 10, 1993.

Raymond L. Lowrie,

Assistant Director, Western Support Center.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T, of the Code of Federal Regulations is amended as set forth below.

PART 944—UTAH

1. The authority citation for part 944 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 944.15 is amended by adding new paragraph (w) to read as follows:

§ 944.15 Approval of amendments to State regulatory program.

* * * * *

(w) With the exceptions of (1) Utah Admin. R. 645–301–553.650, the requirement for regulatory authority approval of Utah's AOC alternative; (2) Utah Admin. R. 645–301–553.651, the height and length requirements of retained highwalls; and (3) Utah Admin. R. 645–301–553.652, replacement of a pre-existing cliff or similar natural premining feature with a retained highwall and the date of applicability of those rules, the following revisions to the Utah Administrative Rules, as submitted to OSM on April 30, 1992, and revised on September 30, 1992, are approved effective September 17, 1993.

645–100–200	Definition of "Highwall."
645–301–553	Contemporaneous Reclamation for Backfilling and Grading.
645–301–553.100	Backfilling and Grading of Disturbed Areas.
645–301–553.130	Static Safety Factor.
645–301–553.510, .520, and .521	Backfilling and Grading of Previously Mined Areas.
645–301–553.523	Static Safety Factor and Alternative Stability Criteria.
645–301–553.620	Incomplete Elimination of Highwalls in Previously Mined Areas.
645–301–553.630 and .631	Required Regulatory Authority Approval for Mountaintop Removal Operations.
645–301–553.632 and .633	AOC Variance Criteria.
645–301–553.652	Replacement of a Pre-existing Cliff or Similar Natural Premining Feature With a Retained Highwall.
645–301–553.653	Modifications to Retained Highwalls Restoring Cliff-Type Habitats Required by Premining Flora and Fauna.
645–301–553.654	Compatibility of Retained Highwalls With the Approved Postmining Land Use and Visual Attributes of the Area.
645–301–553.655	Exemption From Obtaining a Variance From Approximate Original Contour Requirements.

3. Section 944.16 is amended by adding new paragraphs (a), (b), (c), and (d) to read as follows:

§ 944.16 Required program amendments.

* * * * *

(a) By November 16, 1993, Utah shall submit a proposed amendment for highwall retention and approximate original contour (AOC) at Utah Admin. R. 645–301–553.650 to require that, prior to obtaining Utah's approval for highwalls to be retained, the operator must establish and Utah must find in writing that any proposed highwall will comply with the approximate original contour criteria at Utah Admin. R. 645–301–553.651 through 655 and the stability requirement at Utah Admin. R. 645–301–553.523.

(b) By November 16, 1993, Utah shall submit a proposed amendment for highwall retention and approximate original contour at Utah Admin. R. 645–301–553.651 restricting the height of retained highwalls to the height of cliffs or cliff-like escarpments that were replaced or disturbed by the mining operations.

(c) By November 16, 1993, Utah shall submit a proposed amendment stating that its requirement at Utah Admin. R. 645–301–553.652 has an applicability date of December 13, 1982, and applies to any highwall retained pursuant to the approximate original contour alternative.

(d) By November 16, 1993, Utah shall submit a proposed amendment for Utah Admin. R. 645–301–553.523 (1) eliminating the inconsistency between the title "previously mined areas" at Utah Admin. R. 645–301–553.500 and the content of subsection Utah Admin. R. 645–301–553.523, and clarifying that the stability criteria of proposed Utah Admin. R. 645–301–553.523 apply to the AOC alternative at Utah Admin. R. 645–301–553.650, (2) specifying that a highwall remnant or retained highwall must not pose a hazard to the environment, and (3) deleting the phrase "not to exceed either the angle of repose or such lesser slope as is necessary to".

* * * * *

[FR Doc. 93–22676 Filed 9–16–93; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 435 and 436

[MB–42–F]

RIN 0938–AF13

Medicaid Program; Qualified Family Members

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: Under the Aid to Families with Dependent Children (AFDC) program, certain States may elect to limit the number of months of benefits provided to families who are eligible by